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No. 87-1666

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

NORMA ARRIAGA-ZAYAS, *et al.*,
Petitioners,

v.

INTERNATIONAL LADIES GARMENT WORKERS' UNION, PUERTO RICO COUNCIL (LOCAL 600-601), and SPLENDORFORM INTERNATIONAL, INC.,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

REPLY BRIEF ON CERTIORARI

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1. Respondent union does not dispute that, in certain circumstances, the statute of limitations for enforcing the collective bargaining agreement and the duty of fair representation does not begin to run until contractual remedies have been exhausted. Nevertheless, the union contends that this rule does not apply here because petitioners objected only to the union's conduct before the arbitration proceeding. That argument against granting certiorari is erroneous, for two reasons.

First, the policy favoring exhaustion of contract remedies before filing suit, and the concomitant need to give such exhaustion a tolling effect, applies whether a union violates its legal obligations before or during the arbitration proceeding itself. If the union proceeds the employees may obtain full

relief, or even satisfactory partial relief, and thus avoid the need for filing suit. Thus, the union may be able to cure DFR violations that may have occurred during the grievance proceeding and prior to arbitration. But if employees cannot be sure that the statute of limitations will not expire during the arbitration, they must file suit immediately subject to possible withdrawal later. Such a rule, however, simply does not comport either with considerations of judicial economy or, for that matter, with unions' and employers' own interests in avoiding unnecessary litigation.

Second, prospective plaintiffs in fair representation cases often cannot be sure whether the union has violated their rights during an arbitration proceeding until they take discovery. In this case, plaintiffs were not present at the arbitration proceeding and so could not be sure what transpired there at the time they filed their complaint. Moreover, the complaint alleged that the union had not informed plaintiffs about the nature of the grievance charges or the course of the grievance procedure, and had failed to interview plaintiffs in preparing the case. § 18. Again, if prospective plaintiffs must guess what the facts will ultimately show and which of their fair representation claims will ultimately prove to be meritorious, and file suit six months following the first of the union's violations in order to be sure that their suits will be timely, the result will once again be much unnecessary litigation.

2. Respondent union also contends that before filing the petition for a writ of certiorari, petitioners "never so much as hinted their delay in suing had the least connection to a pending grievance." Opposition at 19, 21. This contention is incorrect. In the court of appeals, petitioners argued that federal law required them to exhaust their contractual remedies before filing suit, Br. at 12-16, and that their claim did not accrue until exhaustion was completed. Br. at 16. In the district court,

petitioners made the same argument in their Answer to the Motion to Dismiss, at 11 (employees must exhaust, and "this we [did] when we wait[ed] for the termination of the grievance proceeding"); in their Answer to the Motion for Summary Judgment, at 11 (same quotation), and in their Reply to the Supplemental Memorandum of the Employer, at 4 ("plaintiffs afforded the Union the opportunity to act on their behalf by waiting for the decision of arbitrator Helfeld; plaintiffs could be [dismissed] if they filed the present claim . . . before the arbitration proceeding was finished" (citations omitted)).[1]

Thus, petitioners plainly presented to the lower courts the same argument on which they rely in their petition, and this case is a good vehicle for resolving the question whether the statute of limitations in hybrid actions runs before the grievance and arbitration procedure has been exhausted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[1]Copies of these briefs have been lodged with the Clerk.